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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

YELLOWCAKE, INC., California
corporation,

Plaintiff,

v.

HYPHY MUSIC, INC.,

Defendant.

Case No.: 1:20-cv-00988-JLT-BAM

[Assigned to the Hon. Jennifer L. Thurston]

**HYPHY MUSIC, INC.’S OPPOSITION
TO YELLOWCAKE, INC. AND
COLONIZE MEDIA, INC.’S MOTION
FOR SUMMARY JUDGMENT AND
SUMMARY ADJUDICATION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

HYPHY MUSIC, INC.,

Counterclaimant,

v.

YELLOWCAKE, INC.; COLONIZE
MEDIA, INC; JOSE DAVID
HERNANDEZ; and JESUS
CHAVEZ SR,

Counter-Defendants.

Date: September 29, 2023

Time: 9:00 a.m.

Dept.: Courtroom 4 (7th Floor)
2500 Tulare Street
Fresno, CA 93721

Judge: Hon. Jennifer L. Thurston

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I. INTRODUCTION

Beginning in or about 2013, Hyphy embarked on what would be, for several years, an amicable working relationship with the Spanish-language musical group Los Originales De San Juan (the “*Group*”). The Group was at all relevant times comprised of lead singer Counter-Defendant Jesus Chavez, Sr. (“*Chavez*”), accordion player Domingo Torres Flores (“*Flores*”) and drummer Alfonso Vargas (“*Vargas*”). Together, Hyphy and the Group co-created three (3) studio and two (2) live musical albums, which Hyphy then distributed.

In or about March 2019, however, Chavez was approached by Counter-Defendant Jose David Hernandez (“***Hernandez***”), who had unlawfully obtained insider information about Hyphy’s business and relationship with Chavez, with a scheme to profit off of Hyphy. Through his companies Yellowcake and Colonize, Hernandez would (a) enter into an “Asset Purchase Agreement” purportedly buying rights to the relevant albums from Chavez, but without alerting Hyphy, or any of the other members of the Group; (b) distribute newly-released, pirated versions of the relevant albums over the internet via various digital service providers (“***DSPs***”); and

(c) then sue Hyphy for “copyright infringement,” on the basis that Hyphy was “competing” with Counter-Defendants’ pirated versions.

As is common with copyright trolls and the frivolous claims they bring, however, Yellowcake’s lawsuit makes little sense legally. Most importantly, Yellowcake failed to acquire sufficient rights in the relevant albums to give them standing to sue Hyphy for copyright infringement. Furthermore, Hyphy is a co-owner, or, at a minimum, licensee of the relevant albums, based on its principal’s creative contributions to the relevant albums, and its acquisition of Flores and Vargas’ rights therein, and Yellowcake therefore cannot sue Hyphy. Perhaps most tellingly, Yellowcake has no coherent claim for damages, having failed to even disclose any calculation of damages via an Initial Disclosure statement.

Put simply, this is nothing more than a “stick up” by Yellowcake, and this Court should therefore dispose of the Motion, on the basis that substantial facts exist to undercut Yellowcake’s claim to ownership of the albums at issue here.

II. HYPHY’S SUMMARY OF FACTS

A. Hyphy’s Agreement With The Group To Record The Albums

Hyphy is a record label in the business of collaborating with recording artists to produce, distribute, and otherwise exploit sound and audiovisual recordings, coupled with artwork. Separate Statement in Opposition (“*SSIO*”) Nos. ¶¶ 1, 39, 80. Chavez is the lead singer of the Group. *SSIO* Nos. ¶¶ 2, 40, 81. The Group operates as a co-equal partnership comprised of Chavez and band members Flores and Vargas. *SSIO* Nos. ¶¶ 3, 41, 82.

In or about February 2013, Hyphy and the Group began working together to co-create various sound recordings to be embodied on multiple albums, which the parties orally agreed were to be owned by Hyphy (the “*Agreement*”). *SSIO* Nos. ¶¶ 4, 42, 83. The albums created pursuant to the Agreement were entitled (1) “Amigos y Contrarios”; (2) “Corridos de Poca M”; (3) “El Campesino”; (4) “Desde La Cantina de Mi Barrio (En Vivo)”; and (5) “Nuestra Historia (En Vivo)”

(collectively, the “*Los Originales Albums*” or “*Albums*”). SSIO Nos. ¶¶ 5, 43, 84. One of the other two albums identified in Yellowcake’s Complaint, entitled “Chuy Chavez y Sus Amigos,” has no connection to this dispute and wasn’t even recorded by Chavez. SSIO Nos. ¶¶ 6, 44, 85.

Though the Agreement was not initially memorialized in writing, Flores and Vargas understood that it existed. SSIO Nos. ¶¶ 7, 45, 86. Such co-equal members of the Group also intended that all rights in and to their recording services rendered pursuant to the Agreement be conveyed to Hyphy. *Id.* Flores and Vargas also later confirmed their belief and intent to convey all rights to Hyphy by executing enforceable Copyright Assignment Agreements on or about March 22, 2022 (collectively, the “*Assignments*”). SSIO Nos. ¶¶ 8, 46, 87.

Unlike larger record labels, however, Hyphy closely collaborated with the Group to create the Albums, including as follows:

- For the first three (of five) of the Los Originales Albums, Hyphy:
 - helped determine the “theme” and overall creative direction of each Album;
 - crucially selected the songs to be included in each Album;
 - selected the recording studio, and paid for all costs associated with the recording of each Album;
 - hired the sound engineer;
 - paid the Group a substantial amount to record the Albums; and
 - oversaw and generally supervised the recording and production of each Album. SSIO Nos. ¶¶ 9-15, 47-53, 88-94.
- For the final two (of five) Albums (which are each comprised of recordings from one previous live performance by the Group), Hyphy also:
 - selected and paid for the venue of the live performance;
 - selected the songs to be performed at the live performance (which were recorded and subsequently include in the Albums);

- directly employed, supervised, and directed the services of the sound engineer and videographer who each recorded the audio and video of the live performance, respectively;
- wrote a script for the history of the Group as presented as part of the Group’s live performance, and hired an “MC”/commentator who narrated the script; and
- re-recorded portions of the guitarist’s contributions to the live performance afterwards, using a new guitarist selected, hired and paid for by Hyphy. SSIO Nos. ¶¶16-20, 54-58, 95-99.

It should also be noted here that Flores and Vargas were plainly joint authors of the Albums, for at least the following reasons:

- Flores and Vargas were equally involved in all activities of the Band, which existed as an unincorporated partnership in which all Band members were joint owners, participants and contributors;
- Flores and Vargas were equally credited on all Albums in which each of them made contributions; and
- Flores and Vargas shared equally in all profits of the Band, and were granted equal access to inspect all records related to the Band’s receipt of all such profits. SSIO Nos. ¶¶ 21-23, 59-61, 100-102.

Indeed, Flores and Vargas’s co-equal status in the Group is how the Group is known to the public. For example, none of the individual members of the Group – including Chavez – are individually identified on the Group’s “biography” page located at the website <<https://www.AllMusic.com>> (the “Website”). Furthermore, the Group’s “credits” page on the Website indicates that the credited “Artist” on all albums produced by the Group is “Los Originales De San Juan.” SSIO Nos. ¶¶ 24, 62, 103.

In addition to its original creative contributions to the production, recording and overall creation of the Los Originales Albums, Hyphy also designed and created the artwork featured on the cover of each Album (the “*Album Artwork*”). SSIO

Nos. ¶¶ 25, 63, 104. Hyphy released the Albums, with the Album Artwork, for distribution through all available digital service providers (the “*DSPs*”) between 2013 and 2017. SSIO Nos. ¶¶ 26, 64, 105. Thereafter, Hyphy obtained copyright registrations for all Album Artwork. SSIO Nos. ¶¶ 27, 65, 106.

B. Counter-Defendants’ Surreptitious “Acquisition” Of The Albums And Infringement Of The Album Artwork

Yellowcake is a competing record label and distributor of sound recordings, utilizing Colonize as its “distribution arm” to release and exploit rights that Yellowcake acquires. SSIO Nos. ¶¶ 28, 66, 107. Hernandez is a co-owner of both Yellowcake and Colonize. SSIO Nos. ¶¶ 29, 67, 108. In that position, Hernandez has admitted that both corporations have operated – and continue to operate – as a single economic entity, with common ownership, business operations, office space, staff, and many other resources. SSIO Nos. ¶¶ 30, 68, 109.

In or about March 2019, Hernandez approached Chavez about selling the Los Originales Albums to Yellowcake. SSIO Nos. ¶¶ 31, 69, 110. Hernandez had previously worked with Hyphy and had secretly gained valuable information on Hyphy’s business and relationship with Chavez. SSIO Nos. ¶¶ 32, 70, 111. Hernandez thus knew that Hyphy only had an oral agreement with the Group, and approached and convinced Chavez, without Hyphy or the rest of the Group’s knowledge, to assign the Albums to Yellowcake in exchange for payment of \$500,000. SSIO Nos. ¶¶ 33, 71, 112.

Chavez and Yellowcake attempted to codify their purported agreement via an “Asset Purchase and Assignment Agreement” executed on or about March 21, 2019 (the “*Asset Purchase Agreement*”). SSIO Nos. ¶¶ 34, 72, 113. In Section 13.e. thereof, Chavez represented and warranted to Yellowcake that Chavez was “the only owner of” the Albums, and at the time of sale possessed “good and marketable title” thereto. SSIO Nos. ¶¶ 35, 73, 114. However, Chavez never obtained signed written agreements from Flores, Vargas or Hyphy acquiring each party’s respective

1 contributions to, and rights in, the Albums and sound recordings embodied thereon.
2 SSIO Nos. ¶¶ 36, 74, 115.

3 **III. YELLOWCAKE IS NOT THE ALBUMS' SOLE OWNER**

4 Counter-Defendants' Motion hinges on the false premises that (a) "Chavez
5 has always owned all intellectual property produced by the Group including all
6 copyrights in its sound records" (Motion at 2:6-8), and that (b) "Yellowcake is the
7 sole owner of the Albums" because Yellowcake purportedly purchased rights "from
8 Chavez" (*see*, Motion at 8:4). Counter-Defendants' claims are, however, devoid of
9 any factual or legal basis, and their Motion fails from the very outset for that reason.

10 **A. Counter-Defendants Have Not Met Their Burden Of Proof As To** 11 **Yellowcake's Purported Ownership Of The Albums**

12 **1. Chavez Was Never The Sole Owner Of The Albums**

13 Counter-Defendants' factual averment that Chavez "owned all intellectual
14 property" prior to Yellowcake's purported acquisition of the Albums necessarily
15 serves as the foundation for their entire Motion, and, yet, Counter-Defendants have
16 not provided *any evidence* in their moving papers that support this proposition.
17 Instead, they cite only to a Declaration filed on March 29, 2021 in support of their
18 then-pending Motion to Dismiss (Dkt. 46-2) (the "***Chavez Declaration***"), and rely
19 on a mere two paragraphs therefrom. *See*, Counter-Defendants' Statement of
20 Undisputed Facts ("***Counter-Defendants' UFF***"), No. 3. Cited paragraphs 3 and 4
21 from the Chavez Declaration, however, merely contain Chavez's assertions that he
22 was the "founder and principal" of the Group, which he claims to have founded "in
23 approximately 1987."

24 Such statements do not, in and of themselves, support Counter-Defendants'
25 critical claim that Yellowcake solely owned the Albums by way of Chavez's prior
26 ownership. As set forth below, Flores and Vargas were both co-owners of all rights
27 in the Albums from the outset, and they never transferred their rights to Chavez.
28

Hyphy, via its involvement in the production of each Albums, also has a claim to co-ownership thereof.

2. Chavez’s Bandmates Were Co-Authors, And Thus Co-Owners

Because Counter-Defendants have not presented a complete factual picture to the Court, the Motion, at a minimum, fails to take into account, *or even simply address*, the copyrightable contributions to the Albums provided by Flores and Vargas. Chavez was not, and could not be, anything more than a co-author of the Albums because he had bandmates. In fact, based on musical contributions alone, Flores and Vargas contributed *more* to the creation of the Albums than Chavez (who only sang) because they performed the accordion and drums, which are musical elements that are critical to the particular genre of music at issue (especially the accordion). SSIO Nos. ¶¶ 37, 75, 116.

The Copyright Act defines a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101. However, the legislative history of such definition has actually set forth two alternative criteria for joint works – one focusing on the act of collaboration and the other on the parties’ intent. Childress v. Taylor, 945 F.2d 500, 505 (2nd Cir. 1991) (“[I]t is hard to imagine activity that would constitute meaningful ‘collaboration’ unaccompanied by the requisite intent on the part of both participants that their contributions be merged into a unitary whole...”).

Here, Chavez, Flores and Vargas’s “collaboration” is well established by virtue of their equal ownership and control of the Group, their equal crediting as members of “Los Originales de San Juan,” and their creative contributions to the Albums, all as set forth above. Furthermore, Hyphy has submitted declarations from Flores and Vargas both as part of this Opposition and as part of Hyphy’s own Motion for Summary Judgment, which establish that, at all relevant times, Chavez, Flores and Vargas intended that Flores and Vargas would be co-authors in the

1 Albums. *See*, Dkt. Nos. 78-17, 78-18. Vargas and Flores’s testimony (which is, as of
2 the filing of this Opposition, undisputed¹) is that the Group operated as a co-equal
3 partnership, in which all members equally owned all works created thereby. *See id.*

4 There is also no evidence before this Court (because none exists) to indicate
5 that Flores or Vargas ever transferred any interest in and to their creative
6 contributions to the Albums to Chavez at any time for any reason. Instead, the
7 evidence is clear that Chavez repeatedly acknowledged Flores and Vargas’ valuable
8 contributions to the Albums. Such contributions were so valuable, in fact, that
9 Chavez paid Flores royalties for his “[y]ears working for the band,” and paid Vargas
10 following Chavez’s re-sale of the Works to Yellowcake because “[Vargas] was a
11 good musician...” SSIO Nos. ¶¶ 38, 76, 117.

12 Counter-Defendants’ Motion asserts, in conclusory fashion, that there were
13 not “any other co-owners of the Copyrighted sound recordings in the albums besides
14 Chavez...” Motion at 2:24-26. However, the Motion only relies on paragraphs 8
15 through 19 of Chavez’s Declaration for this proposition. For at least the following
16 three (3) reasons, this citation is unreliable.

17 ***First***, the Chavez Declaration (a) does not attach any evidence or reference
18 any specific facts in support of its critical contention, and (b) *does not even mention*
19 *Flores or Vargas*. Instead, the Chavez Declaration focuses on Chavez’s relationship
20 with Hyphy, and his (non-expert) opinion that Morena was not a co-owner. How
21 Chavez and Counter-Defendants believe such a contention can be well taken
22 without any supporting evidence remains a mystery to Hyphy, but, nevertheless,
23 nothing in the Chavez Declaration can or does “defeat” Vargas and/or Flores’s
24 respective ownership interests in the Albums.

25 ///

26 1 Chavez faces significant credibility issues regarding the presentment of any testimony as to
27 Vargas and Flores’ creative contributions to the Albums. Chavez received \$500,000 from
28 Yellowcake on the representation that he is the only owner of rights in the Albums, and he
therefore has every motivation to be untruthful about his contributions, and the contributions of
those who did not receive any such payment.

1 ***Second***, in the absence of any written agreements among the Group members
2 setting forth differing ownership interests (as is the case here), it is legally meritless
3 for only one member of a band to claim sole authorship of the sound recordings in
4 dispute. The reason is simple: it is well established that the “authors” of any sound
5 recording are its performers and producers. *See, e.g., Copyright Circular 56A,*
6 *Copyright Registration of Musical Compositions and Sound Recordings* (“The
7 author of a sound recording is the performer(s) featured in the recording”). As such,
8 and in the absence of any work-for-hire agreement, **there can be no “single**
9 **author” of a sound recording that contains multiple performers.**

10 Counter-Defendants may attempt to argue that, under *Aalmuhammed v. Lee*,
11 202 F.3d 1227, 1234 (9th Cir. 2000), the Court should rely on Yellowcake’s
12 conclusory attempts to portray Chavez as the Albums’ “mastermind.” But besides
13 being a factual contention that Flores and Vargas dispute (and which is contradicted
14 by each member of the Group’s equal crediting as “Los Originales de San Juan”),
15 this argument ignores key language from *Aalmuhammed* setting forth that when
16 evaluating joint authorship claims, the Court must consider whether the “audience
17 appeal of the work turns on both contributions and ‘the share of each in its success
18 cannot be appraised.’” *Id.* at 1234.

19 As argued above, Chavez may have been the lead singer, but the genre of
20 music that the Group performs makes the instrumentation of the recordings (i.e.,
21 Chavez and Flores’ contributions via the accordion and drums), rather than any
22 vocals contributed by Chavez, a major factor in their appeal. *See, SSIO Nos. 31, 63,*
23 *99. Aalmuhammed* thus favors Flores and Vargas’s interest.

24 ***Three***, paragraph 10 of the Chavez Declaration appears to concede that other
25 individuals were involved with the Albums when Chavez asserts therein that “the
26 only other person involved with the recording of the Albums other than the Band
27 was an independent audio engineer...who the Band engaged to record the Albums.”
28 Dkt. No. 46-2, ¶ 10 (emphasis added). In other words, *even Chavez* cannot stylize

1 himself as the Group’s sole genius, having already conceded that the Albums were
2 the work of a band, not some solo artist.

3 In sum, while Counter-Defendants attempt to dismissively marginalize
4 Vargas and Flores as mere “backing musicians,” such a characterization (a) ignores
5 the nature of the “Los Originales de San Juan” credit that *all* Group members
6 equally possessed, (b) has no bearing on the scope of their creative contributions to
7 the Albums, which evidence alone is dispositive; and (c) is not even consistent with
8 Chavez’s own characterization of Vargas and Flores’ contributions to the Albums.

9 **B. Hyphy Is Also A Co-Author, And Thus Co-Owner**

10 Hyphy itself also was and is a co-author of the Albums, given the nature of
11 the services Hyphy rendered as a producer on the Albums. As noted by the Court in
12 its July 20, 2021 Order, co-authors cannot be liable to other co-authors for
13 infringement. *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 522 (9th Cir. 1990); *Oddo v.*
14 *Ries*, 743 F.3d 630, 632-33 (9th Cir. 1984). Hyphy is a co-author of the Albums for
15 two indisputable reasons.

16 ***First***, Hyphy contributed more than a modicum of creativity to the creation of
17 the Albums, as the Court itself previously recognized. The Ninth Circuit in *Abs*
18 *Entm’t v. CBS Corp.*, 908 F.3d 405, 410-11 (9th Cir. 2018) recently held that a
19 music producer’s work is a copyrightable contribution as follows:

20 “The initial [producer’s] role is often to work in collaboration with the
21 performing artists to make many of the creative decision that define the
22 overall sound of the recording...including such things as microphone
23 choice, microphone placement, setting sound levels, equipment used,
24 processing filters employed, tapes selected, session structure, and other
25 similar decision analogous to the creative choices of photographers”
26 can be original and copyrightable.

27 *Abs Entm’t v. CBS Corp.*, 908 F.3d at 410-11 (internal citations omitted).
28

1 In this case, Hyphy provided the creative direction for each of the Albums,
2 selected the songs to be included in each, paid for the recording studio or venue
3 where each Album was recorded, hired the sound engineer who recorded all of the
4 Albums, and even hired a guitarist to re-record portions of certain Albums. As the
5 Court pointed out in the sister case of *Yellowcake v. Morena Music, Inc.*, “in the
6 absence of a contract, courts consider whether (1) a purported author superintends
7 the work by exercising control; (2) the putative co-authors make objective
8 manifestations of a shared intent to be co-authors; and (3) the audience appeal of the
9 work turns on both contributions and the share of each in its success cannot be
10 appraised. The first factor, control, will often be the most important consideration.”
11 *Yellowcake, Inc. v. Morena Music, Inc.*, 522 F. Supp. 3d 747, 763 (E.D. Cal. 2021).

12 Not only did Hyphy make copyrightable contributions to the Albums, Hyphy
13 was also the party that “superintended” the work – overseeing the work of the sound
14 engineer and the entire production of the Albums. Moreover, with respect to the live
15 Albums, Hyphy decided to re-record the original guitarist’s contributions, oversaw
16 those alterations to the sound recording, and paid all of the expenses in connection
17 therewith. Hyphy was thus plainly a joint author, and a crucial one.

18 ***Second***, even if Hyphy did not contribute enough creatively to the creation of
19 one or more of the Albums, Hyphy became a co-owner when it acquired all of
20 Flores and Vargas’ respective interests in their creative contributions thereto.
21 Because Flores and Vargas never conveyed any rights in their contributions to
22 Chavez or Yellowcake, Flores and Vargas have been in possession of their own
23 rights this entire time. Therefore, those rights were available to be, and have been,
24 acquired by Hyphy via the Assignments.

25 **C. Counter-Defendants’ Arguments In Response To Hyphy’s Various**
26 **Co-Authorship Claims Are Without Merit**

27 Counter-Defendants make the following five (5) arguments in support of their
28 claim that Yellowcake is the exclusive owner of the Albums: (1) there was no “oral”

1 work-for-hire agreement with Chavez; (2) Hyphy's contributions did not rise to the
2 level necessary for it to be a co-author; (3) Flores and Vargas' lack of authorship in
3 the Albums is somehow not in dispute; (4) Flores and Vargas' respective
4 assignments of rights to Hyphy are ineffective, and therefore irrelevant, because of
5 Flores and Vargas' lack of authorship in the Albums; and (5) Yellowcake's
6 Copyright registrations are somehow dispositive.

7 As Counter-Defendants acknowledge, the Court has already ruled on Hyphy's
8 claims to the Albums on the basis of oral work-for-hire agreement(s), and this issue
9 is therefore no longer in dispute in this case. Their remaining arguments are,
10 however, without merit, as explained *in seriatim* below.

11 1. Hyphy's Contributions Rise To The Level Of Co-Authorship

12 Counter-Defendants aver that Hyphy did not make sufficient creative
13 contributions to the Albums to establish co-authorship thereof, but come to this
14 conclusion via the dismissive, factually inaccurate claim that Hyphy only "marketed
15 the [A]lbums and provided the typical functions of a record label and record
16 distributor." Motion at 13:27-14:1. Such a claim, however, does not represent the
17 full extent of Hyphy's claim to co-authorship of the Albums.

18 Counter-Defendants base their assertion regarding the nature and extent of
19 Hyphy's contributions not on any admission in discovery, but on the allegations set
20 forth in Hyphy's First Amended Counterclaims. However, such allegations clearly
21 show that Hyphy "select[ed] the musical compositions, commission[ed] and
22 direct[ed] engineers and directors **and/or provid[ed] the services itself, directing**
23 **the recording and filming of the musical and audio visual performances** to be
24 embodied on the Los Originales Albums..." Dkt. 15 at ¶ 17 (emphasis added). As
25 therefore alleged, Hyphy's contributions were creative and significant, and they
26 establish that Hyphy (not Chavez) "superintended" creation of the Albums.

27 Counter-Defendants cite to both Stillwater Ltd. v. Basilotta, 2020 U.S. Dist.
28 LEXIS 137746 and S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1087 (9th Cir. 1989)

1 for the proposition that merely providing “direction” is somehow not enough to
2 qualify as a creative contribution. But such cases are easily distinguishable.

3 The unpublished decision in Stillwater resulted from the wholly distinct
4 factual scenario of a label claiming a copyright interest merely from having
5 “financed, approved, marketed, and distributed” the relevant copyrighted work.
6 Here, Hyphy actually conceived of the theme of each Album, selected specific songs
7 to be included, and determined the song arrangement of each Album, all of which
8 significantly influenced how each Album would be presented to (and subsequently
9 perceived and interpreted by) the audience. These contributions were more than
10 “activities of a record label” that the Stillwater court found insufficient.

11 S.O.S., Inc. is also not even remotely on point. Such case concerned computer
12 programmers and the contributions one would expect therefrom, rather than a
13 musical group and producer, and the unique creative dynamic that can exist between
14 them in the creation of an album. Hyphy did not just provide “direction” – it worked
15 closely with Chavez, Flores and Vargas to create Albums that reflected the
16 authorship of each of them.

17 2. Counter-Defendants Have Failed To Successfully Dispute Flores
18 And Vargas’ Co-Authorship And Co-Ownership Claims

19 Instead of presenting testimony from Chavez disputing Flores or Vargas’
20 respective contributions (which, at most, would only create a question of fact),
21 Counter-Defendants attempt to claim that Chavez’s sole ownership of the Albums is
22 somehow proven by Hyphy allegedly not producing “any objective evidence...that
23 there was an understanding that Vargas and Flores were coauthors...with Chavez”
24 and by Vargas and Flores not seeking federal registration in their contributions to
25 the Albums. But the law does not require all joint authors in a work to affirmatively
26 obtain their own registrations to be co-authors. Furthermore, the parties’
27 “understanding” is not dispositive—it is equally critical whether Flores and Vargas
28 made significant contributions to each Album’s overall appeal (and the only

1 evidence before the Court on this point is that they did make significant
2 contributions). *See Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000).

3 Perhaps more importantly, “objective evidence” of co-authorship has been
4 provided. Chavez has admitted that the Group is an unincorporated partnership, in
5 which no partnership paperwork exists to establish that Flores and Vargas are
6 anything other than co-equal, co-controlling members. All of the members of the
7 Group – including Flores, Vargas and (most tellingly) Chavez himself – are equally
8 credited as “Los Originales De San Juan.” Furthermore, Flores and Vargas
9 contributed enough to the creation of the Albums that even Chavez admitted such
10 contributions deserved compensation.

11 Counter-Defendants’ argument also ignores a crucial point: Yellowcake is
12 asking this Court to retroactively declare that Flores and Vargas were never co-
13 authors of the Albums (at significant damage to their reputations), even though they
14 are not parties to this case. This Court has no jurisdiction to do so, however, because
15 Flores and Vargas are not parties to this action.

16 In sum, Counter-Defendants have simply “missed a step.” They contend that
17 Yellowcake conducted sufficient due diligence by searching copyright records for
18 registrations by outside third parties, but they failed to require the execution of
19 session agreements or other similar documentation showing that everyone who ever
20 worked on the Albums gave Chavez the express, written right to solely own such
21 Albums and all creative contributions thereto. No such documentation was produced
22 in discovery because no such documentation exists, and Yellowcake therefore has
23 no possibility of prevailing on this issue, either as part of this Motion or at trial.

24 3. Hyphy Has Never “Admitted” That Chavez Was The Sole
25 Author Of The Albums

26 In the hopes of distracting the Court from the glaring holes in their own case,
27 Counter-Defendants also claim that Hyphy “admitted” to Chavez’s sole ownership
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1 of the Albums in various pleadings and in discovery. Of course, none of these
2 alleged “admissions” are, in reality, actual admissions of fact, as explained below.

3 Counter-Defendants’ claim that Hyphy “admitted” to Chavez’s sole
4 ownership because Hyphy alleged that it entered into an oral recording agreement
5 “with Jesus Chavez,” fails for the following two (2) reasons. FAC at ¶ 16. **First**,
6 alleging that Hyphy contracted with Chavez for the Albums does not, in and of
7 itself, constitute an express admission that Chavez was the sole owner of such
8 Albums – only that Hyphy preferred to communicate through Chavez in working
9 with the Group. **Second**, Yellowcake cannot rely only on *allegations* from Hyphy’s
10 Counterclaims to contend that an argument is free of any triable issues of fact – it
11 must rely on material that would be admissible *in evidence*. See FRCP 56(c)(2).

12 Counter-Defendants also claim that Hyphy “admitted” to Chavez’s sole
13 ownership because Hyphy’s owner, Jose Martinez, submitted a declaration, at one
14 point, claiming that Hyphy “commissioned Jesus Chavez to provide services” and
15 “agreed to...pay Chavez a fixed amount, in exchange for Chavez’s agreement
16 to...perform and record...” Dkt. 45-1, ¶ 2. Nothing in such statements, however,
17 constitutes an express admission that Chavez definitively owned all rights in the
18 Albums. Rather, Mr. Martinez’s statements further support Hyphy’s position that
19 their dealings with Chavez were actually dealings with the Group through Chavez.

20 Finally, Yellowcake claims that Hyphy “admitted” to Chavez’s sole
21 ownership via its supplemental response to Interrogatory Nos. 5, 6, 9 and 10.
22 Motion at 14:1-2. But, in all such responses, Hyphy indicates that it commissioned
23 the Albums from Chavez and Flores (whose full name is “Domingo Torres Flores”
24 and is sometimes referred to in this dispute as “Torres”). By identifying Flores in the
25 same breath as Chavez, such responses therefore cannot possibly constitute an
26 admission that Chavez was the sole owner of the Albums.

27 Counter-Defendants also contend that the above-identified “admissions” were
28 “corroborated” by Hector Rosales, the studio engineer who recorded the Albums

1 and – under pressure from Counter-Defendant Hernandez – signed a declaration
2 supporting such contention. Dkt. 46-1. At most, Mr. Rosales’s testimony creates a
3 question of fact, as such testimony is contradicted by Vargas and Flores. Moreover,
4 Mr. Rosales’ statements amount to improper legal opinions made by someone who
5 is neither a lawyer, nor an expert whose opinions can be treated as fact.

6 4. The Assignments Are Valid

7 Yellowcake also attempts to attack the credibility of the Assignments between
8 Morena, Flores and Vargas, but this is also nothing more than a distraction having
9 no bearing on the real legal question at issue: whether Flores and Vargas owned
10 rights in the Albums that Chavez could not assign without their consent.

11 Just because Flores and Vargas didn’t learn about this dispute until after it had
12 commenced does not mean that they did not each possess an interest in the Albums
13 that could be assigned, to address their mistaken belief that such rights had already
14 been assigned. Similarly, just because Flores and Vargas chose to rely on the
15 representations of others as to the contents of the Assignments rather than reading
16 such documentation themselves (just as they relied on Chavez’s representations
17 when he negotiated with Morena on behalf of the Group) does not mean that such
18 Assignments are invalid and fail to convey Flores and Vargas’ respective rights in
19 the Albums. And, just because disputes common to many musical groups have
20 arisen between Chavez, Flores and Vargas does not mean that Flores and Vargas
21 have somehow testified falsely to any matter, or that they did not actually have an
22 interest in the Albums that they could lawfully assign to Hyphy.

23 Finally, the fact that Flores and Vargas executed the Assignments for one
24 dollar does not mean that they did not each have an interest in the Albums that could
25 be assigned to Hyphy. To the contrary, payment to each of them of only one dollar
26 is reflective of the fact that Hyphy had already provided the Group with valuable
27 consideration for the Albums under the original oral recording agreement.
28 Yellowcake does not bother trying to argue that payment of one dollar constitutes

1 insufficient consideration for the Assignments because it is legally sufficient, and
2 the Court should view such payment not as proof that no Assignment took place but,
3 rather, as proof that an agreement with the Group for Hyphy to acquire rights in the
4 Albums upon there recordation did, in fact, previously existed.

5 5. Registration Of Copyrights, Without More, Is Insufficient To
6 Prove Yellowcake’s Ownership Of The Albums

7 Counter-Defendants also claim – falsely – that Yellowcake is the “undisputed
8 owner” of the Albums because, after the transfer from Chavez, it “complied with all
9 requirements set forth by the Copyright Act...by registering copyrights for each
10 Album” and “Hyphy did not file a counterclaim for declaratory judgment contesting
11 the registrations...” Motion at 10:18-20. Of course, obtaining a copyright
12 registration does not grant a registrant “undisputable” ownership rights that can only
13 be rebutted through the filing of a counterclaim for declaratory relief. Rather, a
14 registration creates a *rebuttable* “presumption” only, and “an infringement
15 defendant must simply offer some evidence or proof to dispute or deny the
16 plaintiff’s prima facie case of infringement.” United Fabrics Int’l, Inc. v. C&J
17 Wear, Inc., 630 F. 3d 1255, 1257 (9th Cir. 2011).

18 That is exactly the case here. Counter-Defendants claim ownership by way of
19 an assignment of rights from Chavez only, and Hyphy has offered evidence
20 rebutting this position via multiple legal theories. Such a simplistic claim, which
21 belies even the most basic understanding of how copyright ownership claims are
22 litigated, should not be consider, as it of no value to the Court in ruling on this case.

23 **IV. YELLOWCAKE DOES NOT HAVE A TENABLE CLAIM FOR**
24 **COPYRIGHT INFRINGEMENT**

25 With the foregoing established, Hyphy will now address each of Counter-
26 Defendants’ remaining arguments in their Motion.

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1 A. **Hyphy Did Not Infringe The Albums Because Hyphy Possesses An**
2 **Ownership Interest Therein**

3 The Motion begins by wrongly asserting that Hyphy infringed upon Counter-
4 Defendants’ rights because Hyphy was “still selling the Albums” after Yellowcake
5 had entered into the Asset Purchase Agreement with Chavez and obtained
6 Certificates of Registration for each Album. *See*, Motion at 11:5-9. But, as discussed
7 above, this argument ignores the fatal flaw with their entire case: the Asset Purchase
8 Agreement only transferred certain rights to Yellowcake that Chavez alone
9 possessed. Chavez did not possess any rights of any other members of the Group,
10 such as Flores and Vargas, or any other third parties, such as Defendants.

11 Critically, all of the co-owners in a copyright must join in transferring all of
12 their collective rights therein for the transferee to receive *exclusive rights* in the
13 copyright. *Sybersound*, 517 F.3d at 1146; 17 U.S.C. § 501(b) (conferring standing
14 only to the legal or beneficial owner of an exclusive right” who “is entitled...to
15 institute an action for any infringement...while he or she is the owner of it”); *see*
16 *also, Silvers v. Sony Pictures Entm’t*, 402 F.3d 881, 887 (9th Cir. 2005) (a transfer
17 of copyright ownership may be effectuated but can still result in exclusive rights in
18 such copyright being owned separately). Accordingly, Yellowcake lacks exclusive
19 ownership of the Albums, and, therefore, lacks standing to bring its claim for
20 Copyright infringement against Hyphy.

21 In addition to not possessing exclusive rights in the Albums, Yellowcake
22 cannot sue Hyphy because *Hyphy itself* is also a co-author and co-owner in the
23 Albums. As discussed above, this is the case by virtue of Hyphy’s co-authorship of
24 the Albums, and acquisition of Flores and Vargas’ rights therein via execution of the
25 Assignments. As noted by the Court in its July 20, 2021 Order, co-authors cannot be
26 liable to other co-authors for infringement. *Ashton-Tate Corp. v. Ross*, 916 F.2d 516,
27 522 (9th Cir. 1990); *Oddo v. Ries*, 743 F.3d 630, 632-33 (9th Cir. 1984).

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1 **B. Even If Hyphy Does Not Possess An Ownership Interest, Hyphy**
2 **Still Did Not Infringe The Albums Because Hyphy Possesses An**
3 **Irrevocable Implied License To Exploit The Albums**

4 Even assuming *arguendo* that the Assignments can somehow be disregarded,
5 Hyphy still possessed, at a minimum, an irrevocable implied non-exclusive license
6 from the outset of the Agreement, and at all relevant times thereafter, to exploit the
7 Albums. *See, Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990).
8 An implied license is granted when “(1) a person (the licensee) requests the creation
9 of a work, (2) the creator (the licensor) makes that particular work and delivers it to
10 the licensee who requested it, and (3) the licensor intends that the licensee-requestor
11 copy and distribute his work.” *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 776 (7th Cir.
12 1996) (*citing Effects*, 908 F.2d at 558-59). Here, Hyphy requested that the Group
13 create the Albums (and Hyphy superintended their creation), and the Group thus
14 delivered the Albums to Hyphy at its request with the knowledge and intention that
15 Hyphy would copy and distribute them. A non-exclusive license was thus created.

16 Furthermore, because Hyphy provided valuable consideration to the Group
17 (which is undisputed), the non-exclusive license is irrevocable. *See, e.g., Asset Mktg.*
18 *Sys., Inc. v. Gagnon*, 542 F.3d 748, 757 (9th Cir. 2008) (after finding that a plaintiff
19 suing for infringement had granted a non-exclusive license to a defendant, the 9th
20 Circuit further held that the nonexclusive license was backed by consideration and
21 therefore irrevocable), *citing, inter alia*, 3–10 Melville B. Nimmer & David
22 Nimmer, *Nimmer on Copyright* §10.02[B][5] (2008)(“[A] nonexclusive license
23 supported by consideration is a contract”). And, neither Yellowcake nor Hernandez
24 have ever been in a position to cancel this non-exclusive license to Hyphy because
25 Flores and Vargas also had input in the granting and revocation thereof, by virtue of
26 their respective interests in the Albums. Simply put: Flores and Vargas are not
27 parties to this case, and this Court therefore cannot rescind, negate or rule upon the
28 legitimacy of any license granted by them.

1 **C. Yellowcake Has No Provable Damages**

2 Yellowcake also cannot maintain a Copyright infringement claim against
3 Hyphy because Yellowcake is not entitled to recover any damages thereon. It is
4 axiomatic that there can be no legal claim for relief in the absence of damages.
5 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). While Yellowcake fails to
6 assert a right to, and therefore waives the ability to claim, statutory damages or
7 attorneys’ fees under 17 U.S.C. § 504(c), even actual damages are not awardable.
8 This is because Yellowcake (a) failed to disclose the basis for, or a computation of,
9 any damage claim in its Initial Disclosures, or otherwise; and (b) failed to produce
10 any evidence in discovery of actual damages incurred.

11 “Rule...26(a)(1)(A)(iii) requires the disclosure of ‘a computation of each
12 category of damages claimed by the disclosing party – who must also make
13 available...the documents or other evidentiary material...on which each
14 computation is based...,’ regardless of whether the opposing party requests [it].”
15 *Ingenco Holdings, LLC v. Ace Am. Ins. Co.*, 921 F.3d 803, 821 (9th Cir. 2019).
16 “Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any
17 information required to be disclosed by Rule 26(a) that is not properly disclosed.”
18 *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008).

19 In accordance with Rule 37(c)(1), the Ninth Circuit has forbidden plaintiffs
20 who fail to make substantive disclosures under Rule 26(a)(1)(A)(iii) from offering a
21 damage case at trial. For example, in *Ingenco*, 921 F.3d at 821, the Ninth Circuit
22 upheld the exclusion of damages when a plaintiff’s initial disclosures “were never
23 supplemented” and such plaintiff “never disclosed any damages information related
24 to statutory claims,” even though the plaintiff’s Rule 30(b)(6) designee arguably
25 provided the information. In *Bastidas v. Good Samaritan Hosp.*, 2017 WL 1345604
26 (2017, N.D. Cal.), the Court even granted a motion to exclude damage calculations
27 submitted after the discovery cut-off date regarding “financial losses that plaintiff
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1 claims to have suffered” because the plaintiff “failed to turn over each computation
2 until the last minute.”

3 Here, Counter-Defendants entirely failed to serve any Initial Disclosures, and
4 the discovery cut-off date has come and gone. SSIO Nos. ¶¶ 76, 118. Yellowcake
5 thus failed to identify any damages beyond the mere categories of damages set out
6 in the Complaint. SSIO Nos. ¶¶ 77, 119. Counter-Defendants had an obligation
7 under Rule 26 to quantify their damages, but never did, and Yellowcake therefore
8 cannot present a case for actual damages at trial now.

9 In their Motion, Counter-Defendants attempt to claim for the first time that
10 Yellowcake is somehow entitled to Hyphy’s profits. Yellowcake, however, never
11 sought this type of damages in the Complaint or non-existent Initial Disclosures, and
12 Hyphy would be plainly prejudiced now if Yellowcake were allowed to seek
13 damages on any theory it failed to allege or disclose.

14 Counter-Defendants attempt to “cure” these failures through a surprising bit
15 of sophistry. Namely, they argue that their “actual damages” are “Defendants’
16 profits” – but this argument ignores the plain language of Section 504(b) stating that
17 these are two entirely distinct “buckets” of damage (and thus should be plead
18 separately). Specifically, Section 504(b) states that the owner of a copyright is
19 entitled to “the actual damages suffered by him...**and** any profits of the infringer
20 that are not attributable to infringement **and are not taken into account in**
21 **computing the actual damages.**” 17 U.S.C. § 504(b) (emphasis added.)

22 Put more bluntly, Yellowcake cannot wave its hands and say “*actual*
23 *damages, Defendants’ profits, same thing*”; the law recognizes these as distinct and
24 separate theories of recovery. Counter-Defendants did not treat them distinctly, and,
25 in fact, never even mentioned lost profits until filing their Motion. Counter-
26 Defendants cannot change their mind long after discovery cut-off because they were
27 not diligent earlier.

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1 Finally, *even if* the Court permits Counter-Defendants to present a calculation
2 of damages they have never previously disclosed until now, the calculation they put
3 forth is hardly a calculation at all, and its use is not supported by the law of the
4 Ninth Circuit. Counter-Defendants claim that they need only offer evidence of
5 Hyphy's gross revenues associated with the alleged infringing activity to establish
6 damages. This position, however, fails to acknowledge that Hyphy is also entitled to
7 present its "deductible expenses and the elements of profit attributable to factors
8 other than the copyrighted work." 17 U.S.C. § 504(b).

9 As the 9th Circuit in *Polar Bear Prods., Inc. v. Timex Corp.* stated, Section
10 504(b) "creates a two-step framework for recovery of indirect profits: 1) the
11 copyright claimant must first show a causal nexus between the infringement and the
12 gross revenue; and 2) once the causal nexus is shown, the infringer bears the burden
13 of apportioning the profits that were not the result of infringement." *Polar Bear*
14 *Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 711 (9th Cir.2004). Upon deduction of
15 Hyphy's costs to create and market the Albums, however, the Court will find that no
16 "profits" exists (and are therefore owed to Yellowcake), even if Hyphy is liable for
17 copyright infringement (which it is not). As set forth in the Declaration of Jesus
18 Chavez, Hyphy incurred approximately \$124,700 in verifiable costs, but only
19 generated approximately \$104,131 in verifiable revenue – establishing that Hyphy
20 has taken a loss of \$20,569 on the Albums. SSIO Nos. ¶¶ 79, 120.

21 Accordingly, Counter-Defendants have no claim for actual or statutory
22 damages upon which they can base a cause of action for Copyright infringement.

23 **V. COUNTER-DEFENDANTS INFRINGED HYPHY'S COPYRIGHTS**

24 Counter-Defendants also move for summary adjudication of Hyphy's
25 remaining counterclaims asserted against them. However, Counter-Defendants'
26 arguments appear to be a direct response to the arguments Hyphy has presented in
27 its own, already-filed, Motion for Summary Judgment. Thus, Hyphy expressly
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1 incorporates herein by this reference Hyphy's Motion for Summary Judgment, and
2 also addresses such arguments as follows.

3 ***First***, Counter-Defendants make various technical arguments in an attempt to
4 exclude Hyphy's evidence of infringement – including that Hyphy's evidence “lacks
5 foundation.” However, Hyphy *has* established in its Motion for Summary Judgment
6 exactly how the evidence was obtained, and why it constitutes verifiable proof that
7 Counter-Defendants uploaded the Albums with Hyphy's copyrighted Album
8 Artwork. Counter-Defendants also claim that the evidence is inadmissible because it
9 was “not produced pursuant to a valid subpoena or accompanied by a business
10 records certification,” but Counter-Defendants provide no authority for the
11 suggestion that documentary evidence can never be admissible unless it is produced
12 via a subpoena.

13 ***Second***, Counter-Defendants claim that Hyphy's evidence of infringement
14 “do[es] not reference either Yellowcake or Colonize anywhere.” This claim,
15 however, ignores Hyphy's detailed explanation of how Yellowcake's UPC numbers
16 **definitively prove** Counter-Defendants' distribution of the Albums with Hyphy's
17 Album Artwork. *Counter-Defendants don't even address the UPC numbers at all*,
18 or the expert testimony presented by Hyphy to establish exactly how such numbers
19 prove Yellowcake's involvement. Counter-Defendants' strategy therefore seems to
20 be: ignore Hyphy's technical evidence and argument proving infringement, in the
21 hopes that the Court might overlook the same and take Counter-Defendants at their
22 word when they insist, without more, that they've done nothing wrong.

23 ***Third***, Counter-Defendants argue that “Hyphy and nonparty Morena have
24 essentially committed a fraud on this Court” through their introduction of the UPC
25 evidence. In making such argument, Counter-Defendants rely on a single e-mail
26 from an unrelated third party who they claim was “one of Daddy Kool Records’
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1 digital distributors”². Notwithstanding the fact that *this* email lacks foundation and,
2 more importantly, was never produced via Initial Disclosures or through discovery
3 (as is apparently Counter-Defendants’ habit), this argument is utterly baseless for
4 the following reasons.

5 First of all, and most importantly, in the e-mail, the alleged “distributor” was
6 shown three UPC numbers (821691353127, 821691351628, and 821691350324)
7 and asked who distributed the Albums for *those* numbers. However, those UPC
8 numbers are **not** the same UPC numbers at issue in this case and identified in
9 Hyphy’s Motion. The Motion makes clear that the UPC numbers proving
10 Yellowcake’s infringement are **758381471406, 758381471420, and 758381471413**.

11 In other words, if any party is attempting to perpetrate a fraud upon this
12 Court, it is Counter-Defendants, by referencing inapplicable UPC Codes in an
13 obvious, bad-faith attempt to mislead this Court.

14 Additionally, Counter-Defendants are essentially accusing Morena Music (a
15 non-party) of somehow distributing Hyphy’s music and then trying to conceal a
16 relationship between them without any evidence for such a baseless conspiracy
17 theory. In response, Hyphy has therefore obtained a Declaration from Eduardo
18 Leon, the principal of Morena Music, who flatly denies every accusation Counter-
19 Defendants have improperly and untowardly lobbed at Morena Music. SSIO No. ¶
20 122. At the risk of stating the obvious, it must also be pointed out that Hyphy and
21 non-party Morena Music are competitors, who have **no** working relationship, other
22 than that both have been targeted by the copyright trolls at Yellowcake. SSIO No. ¶
23 123.

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26 2 Hyphy also notes that Counter-Defendants have introduced this email into the record in the same
27 way as Hyphy’s evidence of infringement, which Counter-Defendants’ ironically insist is
28 inadmissible because it has not been “authenticated” and was not “produced pursuant to a valid
subpoena or accompanied by a business records certification...” See Motion at 23:5-13.

1 This failed smear campaign by Counter-Defendants, however, only shows the
2 power of UPC numbers,³ and the reason why Counter-Defendants *have to* pretend
3 such numbers don't exist in mounting a defense against of their own infringement:
4 the UPC numbers allow Hyphy to definitively connect Counter-Defendants to
5 Hyphy's evidence of the Albums being distributed with Hyphy's Album Covers.

6 Lastly, Counter-Defendants' specious claim of fraud on the Court fatally
7 relies on the completely uncorroborated, self-serving declarations of Counter-
8 Defendants' principals, Kevin Berger and Jose David Hernandez. Mr. Berger's
9 Declaration is particularly incredible, given that he appears to miraculously
10 remember very specific, and conveniently favorable, details regarding Counter-
11 Defendants' distribution practices that he failed to remember during his deposition
12 *as the person most knowledgeable for Yellowcake*. Similarly, Mr. Hernandez has
13 already lied under oath by claiming that Counter-Defendants would never distribute
14 the Albums with Hyphy's Album Artwork, even though Hyphy has proven that they
15 have. SSIO No. ¶ 124.

16 Accordingly, Counter-Defendants' Motion should not be granted as to
17 Hyphy's relevant Counterclaims because a genuine dispute of facts exists.

18 **VI. CONCLUSION**

19 Based on the foregoing, Hyphy respectfully requests that Counter-
20 Defendants' Motion be denied in its entirety.

21 DATED: August 15, 2023

ALTVIEW LAW GROUP, LLP

22
23 By: 

24 **JOHN M. BEGAKIS**
25 *Attorneys for Defendant/Counterclaimant*
26 **HYPHY MUSIC, INC., a California**
27 **corporation**

28 ³ On this point, Hyphy's expert even referred to UPC numbers as "digital social security numbers for products. SSIO No. ¶ 121.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing electronically filed document has been served via a “Notice of Electronic Filing” automatically generated by the CM/ECF System and sent by e-mail to all attorneys in the case who are registered as CM/ECF users and have consented to electronic service pursuant to L.R. 5-3.3.

Dated: August 15, 2023

By: /s/ John Begakis
John M. Begakis